UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	Docket Nos. 52-025-COL and 52-026-COL
Southern Nuclear Operating Company, Inc.	)	
	)	
Combined License for Vogtle Electric Generating Plant Units 3 and 4	)	

INTERVENORS' REPLY TO SOUTHERN NUCLEAR OPERATING COMPANY'S ANSWER IN OPPOSITION TO ADMISSION OF NEW CONTENTION

Pursuant to 10 C.F.R. § 2.309(h)(2), Center for a Sustainable Coast, Georgia Women's Action for New Directions f/k/a Atlanta Women's Action for New Directions, and Southern Alliance for Clean Energy (collectively, "Intervenors") hereby reply to Southern Nuclear Operating Company's ("SNC") Answer in Opposition to Motion to Reopen the Record and Admit New Contention (August 22, 2011) ("SNC Response") with respect to the admissibility of the contention and whether it satisfies the U.S. Nuclear Regulatory Commission's ("NRC's") requirements for timeliness and late-filing.

I. THE CONTENTION IS ADMISSIBLE.

SNC launches an array of meritless attacks on the admissibility of Intervenors' contention. First, SNC argues that the contention impermissibly challenges NRC regulations. SNC Response at 25-26. Because SNC does not identify the regulations that it believes are challenged by the contention, this argument is difficult to fathom. As the contention makes clear, Intervenors do not challenge the adequacy of NRC regulations to protect public health and safety under the Atomic Energy Act. Instead, Intervenors

challenge the adequacy of the NRC's Final Supplemental Environmental Impact Statement for Combined Licenses (COLs) for Vogtle Electric Generating Plant Units 3 and 4 (the "FSEIS") under the National Environmental Policy Act ("NEPA") because its factual determination that compliance with NRC safety regulations will ensure that environmental impacts of reactor accidents will be "SMALL" (*see* FSEIS at 5-17) has been called into question by the conclusions of the NRC's Task Force. To the extent that NRC environmental regulations codify generic findings that environmental impacts of severe reactor accidents or spent fuel pool accidents are "SMALL," Intervenors do challenge those regulations – but they have followed NRC procedures by requesting the NRC to rescind the regulations in their Rulemaking Petition to Rescind Prohibition Against Consideration of Environmental Impacts of Severe Reactor and Spent Fuel Pool Accidents and Request to Suspend Licensing Decision (August 11, 2011) ("Rulemaking Petition").[1]

SNC also incorrectly asserts that the contention is immaterial because it fails to identify any analysis in the FSEIS that is "based on an 'assumption' challenged by the Task Force Report." SNC Response at 26. To the contrary, the contention points out that

[1] SNC's argument that the contention is inadmissible because it involves "a matter already being or soon to be addressed in an NRC rulemaking proceeding" is also meritless. SNC Response at 28 (citing Memorandum re: Staff Requirements -- SECY-11-0093 -- "Near-Term Report and Recommendations for Agency Actions Following the Events in Japan (August 19 2011)). The Staff Requirements Memorandum is completely open-ended, directing the NRC Staff to "engage promptly with stakeholders to review and assess the recommendations of the Near-Term Task Force in a comprehensive and holist manner for the purposes of providing the Commission with fully-informed options and recommendations" and to "provide in a notation vote paper a draft charter for the structure, scope, and expectations for assessing the Task Force recommendations and NRC's longer term review." Nothing in the memorandum proposes to undertake any rulemakings. Furthermore, the memorandum establishes no requirement to address the Task Force recommendations prior to the issuance of pending licensing decisions, as required by NEPA.

the FSEIS asserts that the environmental impacts of design basis accidents are "SMALL," based on the fact that Vogtle will be built and operated to NRC safety standards. Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report at 12 (August 11, 2011) ("Contention"). That conclusion is no longer supportable in light of the Task Force Report's recommendation to expand the scope of the design basis to provide adequate protection of public health and safety. *See* Contention at 12-13.

The FSEIS' statement that Vogtle's compliance with NRC safety regulations ensures that environmental impacts will be small also demonstrates the error of SNC's assertion that "environmental analysis performed pursuant to NEPA does not look to NRC safety regulations for a determination of whether the agency should take action in light of the environmental impacts of the proposed action." SNC Response at 27. Clearly, the NRC relies on its safety findings to conclude that a significant portion of potential reactor accidents pose no significant concerns and therefore require no mitigation or consideration of alternatives under NEPA.

SNC also errs in claiming that Intervenors have mischaracterized the Task Force Report by recommending that additional accident scenarios or additional design features be added to the design basis. Instead, according to SNC, the Task Force "would create a new regulatory category called 'extended design basis.'" SNC at 27. SNC misses the point that whatever the nomenclature, the Task Force would substantially expand the scope of accidents that are subject to mandatory safety regulations and therefore would not be subject to cost-benefit analysis. While SNC asserts that "[m]ost of the elements of these 'extended' design basis requirements are already contained in existing regulations

(*e.g.,* 10 C.F.R. §§ 50.54(hh), 50.62, 50.63, 50.65, 50.150)," in fact two of these regulations address "beyond design basis" risks and/or are considered to be "enhancements" that are not necessary for adequate protection of public health and safety and therefore are subject to cost-benefit analysis. *See, e.g.,* Final Rule, Power Reactor Security Requirements, 74 Fed. Reg. 13,926, 13,932 (March 27, 2009) (clarifying that mitigative measures under 10 C.F.R. § 50.54(hh) are "beyond design basis"); Final Rule, Consideration of Aircraft Impacts for New Nuclear Power Reactors, 74 Fed. Reg. 28,112 (June 12, 2009) (clarifying that 10 C.F.R. § 50.150 provides an "enhanced level of protection beyond that which is provided by the existing adequate protection requirements"). Thus, they are not part of the design basis or exempt from being ruled out as too costly to warrant compliance.

SNC further argues that the contention is inadmissible because "common sense dictates" that considering additional mitigation measures could only reduce the frequency or severity of accidents, "which could not logically lead to a revised conclusion that the environmental impacts of accidents are greater than as currently assessed." *Id.* In making this argument, SNC appears to miss one of the principal ramifications of the Task Force Report: that mitigation measures which formerly could be rejected if they were found to be too costly in relation to their potential benefit should now be considered *necessary.* To view mitigation measures as necessary rather than merely desirable if cost-effective would effectively tip the scales in the NEPA cost-benefit analysis – putting enough weight on the benefits side that mitigation measures will *always* be considered cost-beneficial. As Dr. Makhijani states in his declaration, this would result in major

changes to the NEPA cost-benefit analysis for severe accident mitigation measures. Makhijani Declaration, pars. 10-24.[2]

SNC also claims that the contention is inadmissible because Intervenors have failed to present "significant new information," as required by 10 C.F.R. § 52.39(c)(v). SNC Response at 28 and n.91. SNC offers several quotations from the Task Force Report to support its assertion that the Report has no environmental significance because it did not, in fact, find that regulatory changes are necessary. For example, SNC claims the insignificance of the Task Force recommendations is supported by the following two quotes:

> [T]he Task Force concludes that the current regulatory approach and regulatory requirements **continue to serve as a basis for the reasonable assurance of adequate protection of public health and safety** until the actions set forth below have been implemented.
>
> and
>
> [I]n light of the **low likelihood of an event beyond the design basis of a U.S. nuclear power plant and the current mitigation capabilities at those facilities,** the Task Force concludes that continued operation and continued licensing activities **do not pose an imminent risk to the public health and safety.**

SNC Response at 9 (quoting Task Force Report at 73 and 18, respectively) (emphasis supplied). But SNC ignores the fact that both of the conclusions expressed in these quotations are provisional and based on the expectation that the NRC will make the recommended regulatory reforms. Thus, the Task Force concludes that current regulatory requirements can support a reasonable assurance finding "until the actions set forth below have been implemented" and that continued operation of existing nuclear

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[2] Thus, SNC also errs in arguing that the conclusions of the Vogtle FSEIS would be unlikely to change if it were revised to address the Task Force's conclusions and recommendations. SNC Response at 12.

plants does not pose an immediate threat to public health and safety. Those provisional statements do not detract from or contradict the essential message of the Task Force Report that the NRC's program of mandatory safety regulations requires strengthening in order to provide, over the long term, adequate protection of public health and safety.[3] It is this longer term, *i.e.,* the next 40 years or more, that is addressed by the NRC's licensing process for Vogtle Units 3 and 4.

SNC also quotes the Task Force Report for the purpose of disputing Intervenors' assertion that the Report points to "the need for a reevaluation of the seismic and flooding hazards at the Plant Vogtle site":

> The Task Force concludes that **all of the current early site permits already meet the requirements of detailed recommendation 2.1, relating to the design-basis seismic and flooding analysis,** and all of the current COL and design certification applicants **are addressing them adequately** in the context of the updated state-of-the-art and regulatory guidance used by the staff in its reviews.

SNC Response at 9 (quoting contention at 15) (emphasis supplied). But SNC ignores Detailed Recommendations 3 and 4, which also relate to seismic and flooding issues and which the Task Force would apply to new reactors. In Detailed Recommendation 3, for instance, the Task Force recommends that: "as part of the longer term review, that the NRC evaluate potential enhancements to the capability to prevent or mitigate seismically induced fires and floods." Task Force Report at ix. Similarly, in Detailed Recommendation 4, the Task Force "recommends that the NRC strengthen station

[3] *See* Task Force Report at 18 ("As new information and new analytical techniques are developed, safety standards need to be reviewed, evaluated, and changed, as necessary, to insure that they continue to address the NRC's requirements to provide reasonable assurance of adequate protection of public health and safety. The Task Force believes, based on its review of the information currently available from Japan and the current regulations, that the time has come for such change.")

blackout mitigation capability at all operating and new reactors for design-basis and beyond-design basis external events." *Id.* These "external events" include flooding, for which the Task Force considers the design basis to be inadequate to protect against station blackout. *Id.* at 36-37.

Finally, SNC claims that the Task Force recommendations on which the contention is based are too "generic" to demonstrate the likelihood of any significant changes in the FSEIS for Vogtle Units 3 and 4. SNC Response at 12. While the scope of the Task Force Report is broad, its conclusions and recommendations are quite specific, including the discussion of technical concerns and the identification of measures that should be applied to combined license applications and standardized designs. Task Force Report at 71-72.

For each of these reasons, SNC's argument is without merit, and the contention should be admitted.

II. THE CONTENTION IS TIMELY.

SNC argues that the Intervenors' contention is not "timely," *i.e.,* submitted within 30 days of the availability of new information, because the "central precipitating events" that underlie the contention are the events of the Fukushima accident that began March 11, 2011. SNC Response at 6. While the Fukushima accident clearly is central to the contention, the "central precipitating event" for the contention was the issuance of the Task Force's sweeping report on the relevance of the Fukushima accident to the NRC's regulatory program. Given the lack of complete public information issued from Japan in the aftermath of the accident, and given the fact that the Task Force was chartered by the NRC Commissioners with the specific purpose of assembling information about the

accident and subjecting it to analysis by some of the most highly qualified members of the NRC Staff, it was eminently reasonable for Intervenors to await and depend upon the Task Force Report for their contention.

In fact, the contention was filed early, out of an abundance of caution. The events which truly precipitated the contention were the votes by a majority of the NRC Commissioners not to immediately adopt the Task Force recommendations, as well as their complete failure to address the applicability of NEPA to the Task Force Report. These three votes were taken in July, with the last one occurring on July 27, 2011. *See* *http://www.nrc.gov/reading-rm/doc-collections/commission/cvr/2011/*. Had a majority of the NRC Commissioners decided to adopt the Task Force recommendations as part of the licensing process for Vogtle, or had the NRC committed to comply with NEPA in considering the implications of the Task Force Report for the licensing decisions then pending before the agency, it would not have been necessary for Intervenors to demand that the NRC comply with NEPA by analyzing the environmental implications of the Task Force Report before licensing Vogtle Units 3 and 4.

In addition, it would have been reasonable for Intervenors to wait for the Commission to issue a decision regarding their Emergency Petition to Suspend all Pending Reactor Licensing Decisions pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident ("Emergency Petition"), which was filed in mid-April. In that Emergency Petition, Intervenors sought a determination from the NRC regarding the applicability of NEPA to the lessons learned from the Fukushima accident. Intervenors are still awaiting a decision from the Commission.

III. THE CONTENTION SATISFIES THE STANDARD FOR LATE-FILED CONTENTIONS.

SNC argues that Intervenors do not meet the standard for untimely contentions under 10 C.F.R. § 2.309(c). According to SNC, the "good cause" factor must be measured against the same 30-day period that the NRC applies to the question of timeliness under 10 C.F.R. § 2.309(f)(2)(iii). SNC Response at 23 and n.74. As discussed above in Section II, Intervenors have met this requirement by submitting their contention within 30 days of the issuance of the Task Force Report.

Even assuming for purposes of argument that SNC is correct in arguing that Intervenors could have filed a contention within 30 days after the Fukushima accident began, a number of factors show that Intervenors had good cause for waiting until the issuance of the Task Force Report. First, the accident did not end on March 11, 2011, and instead continued for weeks and even months afterwards. Second, the quantity and quality of public available information about the Fukushima accident was sparse and variable, and therefore difficult to evaluate. The NRC Commissioners addressed this problem by specifically instructing the Task Force to investigate the accident and evaluate its relevance to the operation and licensing of U.S. reactors. It was therefore reasonable for Intervenors to wait until issuance of the Task Force Report to submit their contention. As discussed above, it would have been equally reasonable for the Intervenors to wait to file their contention until after the Commission decided whether to adopt the Task Force recommendations or issued a decision on their Emergency Petition. Finally, the very establishment of the Task Force as a high-level body tasked with evaluating the regulatory implications of the Fukushima accident gave the Intervenors good cause to await the issuance of the Report before filing their contention.

SNC also argues that the contention's "generalized and vague assertions" weigh heavily against admission because it would "create a hopelessly broad inquiry involving potential NRC regulatory changes and would likely delay the Vogtle proceeding until the NRC has made a final determination on the Task Force Report." SNC Response at 24. There is nothing, however, "generalized and vague" about the Task Force's conclusions and recommendations, which are instead specific, detailed, and targeted. And there would be nothing unusual about taking time now to consider the new and significant information presented by the Task Force Report in the licensing decision for Vogtle Units 3 and 4, just as the NRC took over a year to consider the implications of the Three Mile Island accident for new reactor licenses. *See Statement of Policy: Further Commission Guidance for Power Reactor Operating Licenses,* CLI-80-24, 12 NRC 654 (1980). Finally, and perhaps most importantly, NEPA itself precludes consideration of whether a hearing may take longer because new and significant information has surfaced about the environmental impacts of the project. If, as here, such information is presented, the NRC has no discretion to avoid its consideration. NEPA prevents government agencies from making decisions without considering their environmental costs, only to regret them in hindsight. *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350 (1989).

IV. CONCLUSION

For the foregoing reasons, Intervenors' contention should be admitted.

Respectfully submitted this 29th day of August, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **INTERVENORS' REPLY TO SOUTHERN NUCLEAR OPERATING COMPANY'S ANSWER IN OPPOSITION TO ADMISSION OF NEW CONTENTION** was served upon the following persons by Electronic Information Exchange and/or electronic mail.

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